Gala Food Processing, Inc. *and* American Federation of Grain Millers, AFL–CIO–CLC, Petitioner. Case 7–RC–19844

April 27, 1993

DECISION AND DIRECTION

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

The National Labor Relations Board, by a three-member panel, has considered determinative challenges in an election held July 28, 1992,[1] and the Acting Regional Director's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement.[2] The tally of ballots shows 18 for and 18 against the Petitioner, with 2 challenged ballots.

The Board has reviewed the record in light of the exceptions and brief, and adopts the Acting Regional Director's findings, conclusions, and recommendations.

The Acting Regional Director found that the parties intended to include all call-in employees in the stipulated bargaining unit. Accordingly, the Acting Regional Director recommended that the Employer's challenges to the ballots of two call-in employees be overruled. The Employer contends that it intended to include only those call-in employees who were also full-time or regular part-time employees, and that because the stipulation is ambiguous the Board must apply a community-of-interest analysis and sustain the Employer's challenges. We agree with the Acting Regional Director, for the reasons detailed below.

It is settled Board policy to accept stipulations from parties as to bargaining unit composition and voter eligibility unless the stipulations contravene statutory provisions of the Act or established Board policy. *Tribune Co.*, 190 NLRB 398 (1971). If the objective intent of the parties is expressed in the stipulation in clear and unambiguous terms, the Board holds the parties to their agreement. Id. ''If the stipulation is ambiguous, however, as in the case of any contract, the primary question is determining what the parties meant. Thus, the Board has authority to interpret the agreement according to what it finds to have been the intent of the parties.'' *NLRB v. Barker Steel Co.*, 800 F.2d 284, 286 (1st Cir. 1986) (citations and internal quotations omitted). And, in interpreting ambiguous contractual language, it is, of course, well established that resort to extrinsic evidence is appropriate. *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986). If the parties' intent remains unclear, reliance may be placed on community-of-interest principles. *NLRB v. Boston Beef Co.*, 652 F.2d 223, 226 (1st Cir. 1981). Subjective intent is not a proper consideration. *White Cloud Products*, 214 NLRB 516, 517 (1974).

Here, the stipulation is subject to at least two interpretations.[3] By specifying ''call-in employees'' as being ''includ[ed],'' the parties may have intended that all such employees be part of the unit without qualification. The Employer, however, contends that the reference to call-in employees is qualified by the term ''full-time and regular part-time employees'' and that call-in employees are eligible only if they also qualify as full-time or regular part-time employees. Under all the circumstances, we find that the parties' stipulation itself is unclear. Accordingly, we properly look to extrinsic evidence to determine the parties' intent.

The Petitioner initially sought a unit of all full-time and regular part-time employees, including warehouse assistants. The Employer, communicating exclusively through the Board agent, proposed the inclusion of call-in employees. The Petitioner requested their names. The Employer replied, without qualification, that the last 12 names on a list of active hourly employees that it had previously provided to the Regional Office constituted the Employer's call-in employees. The names of the two employees eventually challenged, Michael Bailey and Luther Hale, were among the names identified by the Employer. Thereafter, the Employer and Petitioner signed the Stipulated Election Agreement.

In light of the foregoing, we agree with the Acting Regional Director that the objective intent of the parties at the time they executed the Stipulated Election Agreement was to include all call-in employees in the bargaining unit. In reaching this conclusion, we particularly rely on the Employer's furnishing the Board agent with the names of ostensibly all its call-in employees without qualification after proposing the addition of this classification to the petitioned-for unit.[4] Significantly, the Employer furnished the names of the call-in employees before the stipulation was reached. This extrinsic evidence resolves the ambiguity in the stipulation and strongly supports the conclusion that

[1] All dates are in 1992.

[2] The stipulated unit is: ''All full-time and regular part-time employees, including call-in employees, and warehouse assistants, employed by the Employer at its facility located at 1475 Hill-Brady Road, Battle Creek, Michigan; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.'' We have corrected the Acting Regional Director's inadvertent omission of a comma after ''including call-in employees.''

[3] The stipulation reads in full:

> All full-time and regular part-time employees, including call-in employees, and warehouse assistants, employed by the Employer at its facility located at 1475 Hill-Brady Road, Battle Creek, Michigan; but excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

[4] We rely on this conduct as extrinsic evidence of intent. We do not imply that the list of names supplied by the Employer was a final and binding eligibility list within the meaning of *Norris-Thermador Corp.*, 119 NLRB 1301 (1958).

the parties intended that all, not some, of the call-in employees be included in the unit.[5]

More specifically, and in response to our dissenting colleague, we find that the stipulation on its face clearly and unambiguously includes the position of call-in employee in the unit. What is ambiguous on the face of the stipulation is whether the parties intended to include all call-in employees, regardless of the regularity of their work, or to include only those call-in employees who were regular part-time employees. At times the Board's inquiry into the meaning of a stipulation ends at this point, i.e., on finding the stipulation to be facially ambiguous, and the Board proceeds to apply a community-of-interest standard and an eligibility formula. Here, however, we have found extrinsic, objective evidence that the parties intended to include all call-in employees.[6] As indicated above, ''In stipulated unit cases, the Board's function is to ascertain the parties' intent.'' *Tribune Co*., 190 NLRB 398 (1971). Accordingly, we find that the stipulation, as clarified by the extrinsic evidence, is not ambiguous and includes all call-in employees.[7]

We do not disagree with the cases cited in the dissent, but we do disagree with their relevancy. Absent a *Norris-Thermador* eligibility list, parties are free to challenge individual voters provided that the challenge does not contravene the stipulation. A stipulation is, however, conclusive regarding challenges that are contrary to the stipulation. In this case the Employer challenged the ballots of Michael Bailey and Luther Hale solely on the grounds that they did not work a sufficient number of hours to be considered as regular part-time employees. We have, however, found that the parties intended by their stipulation to include all call-in employees regardless of the regularity of their employment. Thus, we find that the stipulation is conclusive as to the eligibility of Bailey and Hale.[8] We also disagree with our colleague that we have improperly made an adverse credibility resolution. That the Employer's attorney may have intended to include only regular call-in employees does not resolve the issue. Such subjective intent is irrelevant. *White Cloud Products*, supra at 517.

Accordingly, we agree with the Acting Regional Director that the challenges to the ballots of Bailey and Hale should be overruled and a revised tally of ballots should be prepared.

DIRECTION

IT IS DIRECTED that the Regional Director for Region 7, within 14 days from the date of this decision, open and count the ballots of Michael Bailey and Luther Hale, and thereafter prepare and cause to be served on the parties a revised tally of ballots, on which basis the Regional Director shall issue the appropriate certification.

MEMBER OVIATT, dissenting.

My colleagues adopt the Acting Regional Director's findings, conclusions, and recommendations. I cannot agree.

The issue in this case concerns the challenged ballots of Michael Bailey and Luther Hale, who were ''call-in'' employees who were challenged on the ground that they did not work a sufficient average number of hours to be included in the unit.

During the 2-week period prior to the scheduled preelection hearing in this case, the parties had several conversations with the Board agent regarding the possibility of a Stipulated Election Agreement. All such conversations were carried on through the Board agent; there was no direct contact between representatives of the Employer and the Petitioner. During this time, the Employer's representative proposed and apparently the Union agreed, to inclusion of the classification of ''call-in'' employees, and the Employer agreed to the Union's proposal to include the classification of ''warehouse assistant.'' At no time during any of these conversations was the specific eligibility of any Gala employee discussed, other than references to the alleged supervisory status of Carter, Ernsberger, and Winans.

The Acting Regional Director concluded that ''there was a clear meeting of the minds'' on the issue that all ''call-in'' employees including Bailey and Hale were eligible to vote, notwithstanding the fact that no specific eligibility formula had been agreed to, and the parties had not executed a stipulated voter eligibility list. The Employer in its exceptions contends that the Acting Regional Director's position therefore is that the election agreement's unit description, together with the submission of an *Excelsior* list, bars a challenge to the eligibility of any individual who works in a classification included within the unit and whose name ap-

[5] We also note that the Employer's conduct subsequent to the execution of the stipulation was consistent with our interpretation of the parties' intent. Thus, the Employer's *Excelsior* list included the names of all the call-in employees the Employer had previously identified. At the preelection conference, the Employer stated its intention to challenge one call-in employee on the apparent ground that he was no longer employed. At no time prior to the election did the Employer express reservations about the eligibility of any other call-in employee.

[6] That the stipulation was reached through discussions with a Board agent rather than directly by the parties themselves does not, as suggested by the dissent, make a difference. Binding agreements are often made through the intermediacy of third parties, whether the third party is or is not an agent of one of the principals.

[7] Unit inclusion and voter eligibility are, of course, inseparable. *Post Houses, Inc*., 161 NLRB 1159, 1172 (1966).

[8] At the preelection conference the Employer stated its intention to challenge one call-in employee who had not responded to repeated call-ins. The intended challenge to this employee, in contrast to the challenges to Bailey and Hale, was on grounds other than that covered by the stipulation and would not, therefore, be governed by the stipulation. Because the parties agreed to exclude that employee, the Employer did not have to make the challenge during the election.

pears on the *Excelsior* list. I agree that that is the effect of the Acting Regional Director's reasoning, and I also agree that it is erroneous.

My colleagues, although adopting all the Acting Regional Director's findings, conclude, unlike the Acting Regional Director, that the parties' stipulation itself is unclear. I would read the stipulation as encompassing the classifications of call-in employees and warehouse assistants, subject to qualification by the term ''full-time and regular part-time'' employees, in accord with the Board's normal practice, in the absence of a specific eligibility list meeting the standards established in *Norris-Thermador Corp*., 119 NLRB 1301 (1958). That case sets forth the Board's policy regarding attempts by the parties to definitively resolve issues of voter eligibility:

> [W]here the parties enter into a *written and signed agreement* which *expressly* provides that issues of eligibility resolved therein shall be final and binding upon the parties, the Board will consider such an agreement, *and only such an agreement*, a final determination of the eligibility issues treated therein . . . . [Id. at 1301–1302; emphasis added.]

Here of course, it is undisputed that there is no such agreement. Indeed, it also appears undisputed that there was never any discussion regarding the eligibility of either one of the employees whose ballots were challenged. On those grounds, therefore, I would either resolve the challenged ballots now according to the Board's normal community-of-interest standards, or remand the case for a hearing on that issue.

Treating the parties' stipulation as ambiguous, however, does not change that result: i.e., the challenges must still be resolved by application of the Board's normal community-of-interest standards.

I am perplexed by my colleagues' conclusion that the ''intent of the Parties at the time they executed the stipulated election agreement was to include *all* call-in employees,'' irrespective of whether they would be eligible to vote. According to the affidavit submitted by the Employer's attorney, the only ''meeting of the minds'' which occurred between the Employer and the Union is embodied in the Stipulated Election Agreement itself, since the attorney at no time had any conversation with any representative of the Union prior to the day of the election. It was also the Employer's intent that the phrase ''including call-in employees'' have ''express connection to the phrase all full-time and regular part-time employees.'' Thus, my colleagues' conclusion that it was the intent of the parties to include *all* call-in employees amounts in effect to an adverse credibility resolution—but one that cannot properly be made without benefit of a hearing under Section 11396.2 of the Board's own Casehandling Manual. See *NLRB v. Claxton Mfg. Co*., 613 F.2d 1364 (5th Cir. 1980). Further, their relying ''particularly'' on the Employer's furnishing the Board agent with the names of employees after proposal of the stipulation, as supporting the conclusion that the parties intended that all call-in employees be included in the unit is inappropriate. First, the Employer originally furnished to the Region, at the Board agent's request, a list of all hourly employees, so that the Region might examine the Petitioner's showing of interest. In preparing the *Excelsior* list, the Employer merely used the hourly employee list previously submitted to the Board. Additionally, their conclusion that the Employer's conduct was consistent with their interpretation (referring to the preelection conference) is simply inaccurate in my view. At the preelection conference on the day of the election, the Petitioner's representative asked about the status of employee Tucker. The Employer responded that it intended to challenge Tucker's vote. However, there was no discussion as to the eligibility of any other individual on the *Excelsior* list. What my colleagues seem to be saying is that parties to an election, without being asked, must nonetheless volunteer in advance any potential challenges they may wish to make. That of course, is incorrect.

I further find my colleagues' conclusion inconsistent with a considerable body of precedent. In *American Printers & Lithographers*,[1] the Board considered a challenged ballot in a stipulated election. In reversing the trial examiner, who had concluded that the challenge should be overruled based on the stipulation, the Board concluded that the unit description set forth in the stipulation did not preclude passing on the eligibility of the challenged voter:

> Thus, the stipulation here defines in general terms the composition of the unit but is not conclusive on questions concerning eligibility. This is apparent from the absence of an express agreement that eligibility is limited to those whose names appear on an approved eligibility list[4] and the provision in the stipulation that the parties' observers are authorized ''to challenge the eligibility of voters.''

[4] *Norris-Thermador Corporation*, 119 NLRB 1301.

Here, as in *American Printers*, there is no *Norris-Thermador* list, and the stipulation provides for observers authorized ''to challenge the eligibility of voters.''

In *West Virginia Newspaper*, 265 NLRB 446 (1982), the Board considered challenges in an election conducted pursuant to a stipulation for certification on consent election. The unit was described as ''all full-time and regular part-time mailroom employees, including inserters,'' and ''all mailroom employees, including inserters.'' The hearing officer found that all

[1] 174 NLRB 1179 (1969).

inserters were included in the unit and eligible to vote. The Board stated as follows:

> As found by the Hearing Officer, the evidence clearly establishes that the parties, . . . have included the position of inserters in the existing unit.
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> However, contrary to the Hearing Officer's finding, our inquiry does not end there. We must still determine the voting eligibility of *each of the challenged inserters*. The *challenged inserters are ''on call'' employees*. The Board has held that such employees are eligible to vote if they regularly average 4 hours of work per week in the quarter preceding the election. Here, the payroll records show . . . . Therefore, only David Comely is eligible to vote. [Ibid; emphasis added.]

In *NLRB v. Speedway Petroleum*, 768 F.2d 151, 155–157 (7th Cir. 1985), the court enforced the Board's decision (272 NLRB 282) resulting from an underlying determination regarding challenged ballots in an election conducted pursuant to a stipulation. The court observed as follows:

> Where the pre-election stipulation is ambiguous as to whether the employees whose ballot is challenged was included within the bargaining unit, it is clear that the stipulation is to be construed consistently with established or crystallized Board policies.
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> . . . .
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> Application of the above rules to the present situation indicates that the Board was entirely correct in applying Board policies in its decision to sustain the Corrigan ballot challenge despite the existence of a pre-election stipulation. The Board sustained the Corrigan ballot challenge because it found that Corrigan was a ''casual employee.''
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> We agree with the position of the Board at oral argument that the submission of an *Excelsior* list, which is mandatory and is utilized in every representation election, is of little help in determining the intended scope of a pre-election stipulation. . . . To allow the use of extremely broad language in a standard pre-election stipulation combined with the naming of a specific employee in an *Excelsior* list to preclude a ballot challenge to that named employee would severely undermine the Board's important and proper role in regulating representation elections.

In sum, there is no *Norris-Thermador* list here, and the *Excelsior* list is of little help in determining the intended scope of a preelection stipulation. That stipulation here defines in general terms the composition of the unit, but is not conclusive on questions concerning eligibility. ''This is apparent from the absence of an express agreement that eligibility is limited to those whose names appear on an approved [*Norris-Thermador*] list.'' A finding that all eligibility issues were resolved by the parties' stipulation is in my view inconsistent with the stipulation itself, and the Board's own case handling procedures.

Accordingly, I would consider and resolve the challenged ballots under the Board's established standards regarding ''on-call'' employees.